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No. 90-1097

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990.

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In re: BERNARD J. DOLENZ, Petitioner

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APPENDIX TO THE  
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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February 13, 1991

## QUESTIONS PRESENTED

1. Should this Court entertain a Petition for Certiorari on issue of the District Court's exercise of its admiralty jurisdiction where the District Court's jurisdiction is predicated upon a finding of fact.

2. Did the trial court offend traditional concepts of due process by proceeding to trial where no Motion for Continuance of the Trial had been sought or requested.

## LIST OF PARTIES

The parties to the proceedings below were the vessel "Aries Startrek", enrollment No. 555798 and the Plaintiff below, Stuart Yacht Builders, Inc. Melissa Keyes filed a claim of owner in accordance with Supplemental Rule C(6). The case was tried before the Honorable William J. Zlock.

The present petitioner, Bernard Dolenz, filed no pleadings in the district court until after the trial of this matter was held. Dolenz has never intervened nor has he filed an appearance as attorney on behalf of the Defendant vessel "Aries Startrek".

Dolenz apparently is appearing pro se in this proceeding. It should, however, be pointed out that the Defendant below was never Dolenz but rather was the Defendant vessel "Aries Startrek" for whom he has never appeared.

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## OPINIONS BELOW

The Final Judgment of the District Court for the Southern District of Florida has not been reported. A reprint of this opinion is attached in the Appendix hereto at page 1.

The Order of the District Court for the Southern District of Florida denying the motions of Bernard Dolenz to dismiss, for intervention, and for reconsideration has not been published. A reprint is attached in the Appendix hereto at page 17.

The Order of the District Court for the Southern District of Florida denying Petitioner's Motion for Substitution has not been reported. A reprint is attached in the Appendix hereto at page 19.

The decision of the Eleventh Circuit Court of Appeals dismissing the appeal of Bernard Dolenz has not been reported. A reprint of that Order is attached in the Appendix hereto at page 26.

The decision of the Eleventh Circuit Court of Appeals denying the Petition for Prohibition or Mandamus of Bernard J. Dolenz has not been reported. A reprint of that Order is attached in the Appendix hereto at page 28.

## JURISDICTION

The District Court's jurisdiction emanates from 28 U.S.C. Section 1333 and 46 U.S.C. Section 971. This case was tried to the Court on March 16, 1987. The District Court entered a Final Judgment on February 16, 1988.

This Court's jurisdiction for purposes of consideration of the Petition for Certiorari emanates from 28 U.S.C. Section 1254.

## STATUTES INVOLVED

28 U.S.C. Section 1333. Admiralty,  
Maritime and Prize cases

The District Court shall have

original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. Section 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

#### STATEMENT OF THE FACTS

Respondent, Stuart Yacht Builders, Inc., filed an in rem action against the Defendant vessel "Aries Startrek" in the District Court in and for the Southern District of Florida. The vessel was seized by the United States Marshal on July 10, 1986, and Stuart Yacht

Builders, Inc. was designated as substitute custodian. On August 4, 1986, Melissa Keyes filed an Answer and Affirmative Defenses on behalf of the vessel as owner of the vessel. The case was tried to the Honorable William Zlock on March 16, 1987. (the transcript is contained in the Appendix at pages 31 - 53)

The Court called the case on the morning of March 16, 1987. At that time the Court was advised by counsel for Melissa Keyes and by Melissa Keyes that she had transferred her ownership interest in the vessel to Bernard Dolenz on the preceding day. Melissa Keyes further advised the Court that she had no authority to represent the new owner Bernard J. Dolenz and that her legal counsel had no authority to represent the "new" owner. Melissa Keyes further represented that neither she nor the attorney had any authority or had been requested to request a continuance on behalf of Bernard Dolenz. Bernard Dolenz filed nothing.



The Court made further inquiry of Melissa Keyes and determined that Bernard Dolenz had been a partner in the vessel for some months prior to the date of the trial. Dolenz, an attorney, was aware that the trial of this cause was to occur on March 16, 1987 but did not communicate in any fashion with the Court and had not requested a continuance.

The Court accepted evidence and testimony from Stuart Yacht Builders, Inc. and no one responded when the Defendants case was called.

Dolenz filed a Notice of Appeal with the 11th Circuit which appeal was dismissed for lack of jurisdiction because the notice was untimely filed. Dolenz then filed a Notice for Reconsideration of the 11th Circuit's dismissal which was denied on September 29, 1988. A Petition for Writ of Mandamus and/or Prohibition in the 11th Circuit Court of Appeals was filed on October 1, 1987, which was denied on October 21, 1987. Dolenz then

filed a Petition for Writ of Prohibition or Writ of Mandamus in this Court, Case Number 88-971, which petition was denied on February 21, 1989.

Dolenz has previously also filed a Petition for Certiorari with this Court, Case Number 88-1407, which was denied April 17, 1989. That petition, similar to the petition now before the Court, raised as questions the District Court's jurisdiction and the District Court's proceeding to trial when it did on March 16, 1987. The District Court, in its Conclusions of Law, specifically found as a matter of fact and law that the defendant vessel was a vessel within the meaning of 46 U.S.C. Section 971. Premised on that fact, the Court found that the action below was an admiralty and maritime claim within the meaning of Rule 9(h) and that the Court had subject matter jurisdiction over the vessel.

REASONS FOR NOT GRANTING THE PETITION FOR  
CERTIORARI

Petitioner, DOLENZ, in essence seeks by this Petition a third attempt to have this Court become involved in the fact finding which occurred at the trial level which ultimately led to the conclusion that the District Court had subject matter jurisdiction over the Defendant vessel. Petitioner further seeks, once again, to have this Court review the Trial Court's decision to proceed with trial based upon the situation before the Court at the time that the case was called. On both prior occasions this Court has declined to exercise its discretion in favor of granting the relief sought. (Case No. 88-971 and Case No. 88-1407).

The decision of the District Court, affirmed on appeal, was that the "Aries Startrek" was a vessel within the meaning of

28 U.S.C. Section 1333 and 46 U.S.C. Section 971. That determination of the vessel status necessarily and absolutely involved the resolution of questions of fact by the District Court based upon the evidence which was before it. Based upon that evidence, the District Court concluded that it had jurisdiction pursuant to 28 U.S.C. Section 1333. The Court further concluded that the "Aries Startrek" was a vessel within the meaning of 46 U.S.C Section 971. The Court likewise concluded that the services rendered to the vessel by Stuart Yacht Builders, Inc. were within the scope of 46 U.S.C. Section 971. The Court therefore concluded that Stuart Yacht Builders, Inc. was entitled to a maritime lien pursuant to 46 U.S.C. Section 971 and to a Judgment foreclosing that lien.

Similar to the situation where a Writ of Mandamus or Prohibition is sought, a Petition for Certiorari should not be used to review the fact finding of the trial court. In re:

Muir vs. Gleneden 254 U.S. 522 (1921). While that case dealt with prohibition and mandamus, the same logic can be employed here in as far as the jurisdiction of the District Court was, at best case for Dolenz, in doubt. Because the District Court's jurisdiction was at best case for Dolenz in doubt, it was incumbent upon Dolenz to do more than assert or call into question the issue of jurisdiction. It was incumbent upon Dolenz, at the appropriate time which was at trial, to produce whatever proof and/or evidence which was necessary to sustain his position that the District Court lacked jurisdiction.

On the issue of due process, the evidence produced at the trial of this cause was such that Dolenz maintained an interest in the vessel for months prior to the trial and received a transfer of 100% interest in the vessel prior to the commencement of the trial. Also prior to the commencement of the trial and at the time that Dolenz accepted the

transfer of complete ownership of the vessel, Dolenz was aware of the date of the trial. Dolenz, however, did not retain counsel to appear on his behalf and asked for a continuance, Dolenz did not ask for a continuance on his own behalf, and Dolenz did not authorize the prior owner, Melissa Keyes, to request a continuance on his behalf. Dolenz simply did not attend.

On that record the District Court held the trial at the appointed time. It can hardly be said that the District Court abused its discretion for denying a continuance when none was ever requested.

## CONCLUSION

In conclusion, it is respectfully requested that the Petition for Certiorari be denied. This Court has previously denied Petitioner's request for the same or similar relief on two separate occasions. It is respectfully requested that this Honorable Court, in its Order of Denial, remand this matter to the District Court for the imposition of sanctions against Dolenz pursuant to Rule 11, Federal Rules of Civil Procedure and Rule 38, Federal Rules of Appellate Procedure, in the form of the unnecessary attorney's fees which Dolenz has caused to be expended by Respondent, Stuart Yacht Builders, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this the 19th day of February, 1991 to: BERNARD J. DOLENZ, 6102 Swiss Avenue, Dallas, Texas 75214.

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By: \_\_\_\_\_  
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